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IN THE

Supreme Court of the United States

FALL TERM 1964

NO. 787

SWITZERLAND COMPANY, a Corporation, and JOSEPH H. WALKER, *Plaintiffs*

vs.

STEWART L. UDALL, CONRAD WIRTH, and SAM P. WEEMS, *Defendants*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiffs pray this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the plaintiffs respectfully show to this Court:

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 337 Fed. 2d 56 (4th Cir.), and is printed as an appendix to this petition.

This case came to that Court on appeal from a decision of the United States District Court for the Western District of North Carolina. The opinion of the United States District Court is reported at 225 F. Supp. 812, and is printed in the record which has been filed with this Court (App. pp. 24-42),[1] and is also printed as an appendix to this petition.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which the petitioner now asks this Court to review, is dated September 30, 1964, and was entered by that Court on that date.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of certiorari, is conferred upon this Court by the provisions of 28 USC Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

Where the State of North Carolina conveyed to the United States of America a 200 foot wide R/W for the Blue Ridge Parkway but by express terms in the Deed expressly excepted from the operation of said conveyance its State sovereignty over the entire area embraced in the description and expressly reserved the right to maintain "existing public roads within or across said area," and subsequent thereto employees of the United States, without further notice or proceedings, closed one of such roads by erecting physical barriers across such road where it crosses the Parkway, are abutting landowners on such road barred under the doctrine of Governmental immunity from maintaining an action against the individuals, who admittedly caused such road to be closed, to require them to reopen such road?

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[1]Unless otherwise indicated, all page references are to the printed appendix to the plaintiffs, Switzerland Company, a corporation, and Joseph H. Walker's brief filed in the Court of Appeals, which appendix is now included in the record filed with this Court.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

(See Appendix to Petition pp. 32A-33A)

STATEMENT OF THE CASE

This is an action by abutting landowners to obtain a mandatory injunction requiring the individual defendants to remove obstructions which they admittedly placed across the Kilmichael Tower-Queen Hollow Road at its entrances onto and across the Blue Ridge Parkway in the Little Switzerland Community in Mitchell County, North Carolina. At the time of the acts complained of as the basis of this suit, the individual defendants occupied the following positions of employment: Stewart L. Udall, Secretary of the Department of Interior; Conrad Wirth, Director of National Parks of the Department of Interior; and Sam P. Weems, Superintendent of the Blue Ridge Parkway under the National Park Service of the Department of Interior.

The plaintiff, Switzerland Company, is the owner and developer of the Little Swtizerland residential community of summer homes located on the crest of the Blue Ridge Mountains in McDowell and Mitchell Counties, North Carolina, having developed said community from a 1200 acre tract which it has owned since 1909 and still owns substantial portions of said lands; and the plaintiff, Joseph H. Walker, is the owner of 25 acres of these lands which he purchased by mesne conveyances from the Switzerland Company prior to the obstruction of the Kilmichael Tower-Queen Hollow Road hereinafter referred to. The Kilmichael Tower-Queen Hollow Road traversed the lands of the Switzerland Company from north to south and also provided access to the property of the plaintiff, Walker, whose lands abutted on said road. That this road has been opened and in general use by the public since 1918 or longer and was indicated as such on a properly recorded map (App. pp. 65-66).

In 1937 and 1938 the State of North Carolina took approximately 74.47 acres of the Switzerland Company lands comprising a strip approximately 200 feet wide running in a general east-west direction entirely through the length of the Switzerland Company Property and traversing the various roads in the area including the Kilmichael Tower-Queen Hollow Road. In 1938 the State of North Carolina executed a deed conveying these lands to the United States of America for the purpose of constructing the Blue Ridge Parkway. Said deed from the State of North Carolina expressly provided "BE IT CLEARLY UNDERSTOOD, however, that the purpose of this conveyance is to transfer to the grantee the proprietary estate in the lands described and it is not to be construed as a surrender of state sovereignty over the area embraced in the description herein set out; expressly reserving the right to maintain existing public roads within or across said area, subject to such change of location as may be mutually agreed to by supplementary contract . . ." (App. pp. 62-63).

In the trial of the condemnation suit brought by the Switzerland Company against the North Carolina State Highway Commission in 1938 to access damages for the taking of its property for highway purposes, the defendant, Highway Commission, offered evidence including testimony of employees of the United States Government engaged in the construction of the Blue Ridge Parkway that this Kilmichael Tower-Queen Hollow Road was one of the public roads referred to in the aforesaid exception clause in said deed, this testimony being offered in mitigation of damages.

The Blue Ridge Parkway construction was completed in this area in the year 1938 or 1939, and the Kilmichael Tower-Queen Hollow Road continued to be maintained as one continuous road by accesses of said road being maintained onto

and across the Blue Ridge Parkway and said road remained open and in use until April, 1960, at which time the defendants caused said Kilmichael Tower-Queen Hollow Road to be cut off by erecting barriers on each side of the Parkway at the point where said road entered onto and across the Parkway.

The present action was commenced by the plaintiffs as abutting landowners on said Kilmichael Tower-Queen Hollow Road in the United States District Court for the Western District of North Carolina in April, 1963, and was tried before Judge Warlick, United States District Judge for the Western District of North Carolina, sitting without a jury in January 1964. That Court had jurisdiction over the case by reason of diversity of citizenship as between each of the plaintiffs and all of the defendants. 28 USC, Sec. 1332. The District Court concluded that the Kilmichael Tower-Queen Hollow Road was not a public road based upon its finding that there was no evidence that this road had ever been maintained by the State of North Carolina and concluded that this was a suit against the United States and hence should be dismissed under the doctrine of Governmental Immunity.

The plaintiffs thereupon appealed to the Fourth Circuit Court of Appeals, and judgment was entered by the Fourth Circuit Court of Appeals — this judgment was affirmed in its opinion referred to above.

By the decision of the Court below the plaintiffs, here petitioners, have been deprived of their rights and property as abutting landowners to free access and use in the aforesaid Kilmichael Tower-Queen Hollow Road; and if the decision of the Fourth Circuit Court of Appeals stands, the plaintiffs will be left without remedy either in law or in equity.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

(1) The decision of the Fourth Circuit Court of Appeals in this case is in direct conflict with the decision of other Circuit Courts of Appeal and numerous decisions of the United States Supreme Court.

(2) The decision of the Fourth Circuit Court of Appeals in this case decides a Federal question in a way in conflict with the applicable decisions of the United States Supreme Court.

(3) The decision of the Fourth Circuit Court of Appeals in this case broadens the doctrine of Governmental Immunity far beyond its scope as previously set out in the opinions of the United States Supreme Court in such a way that any employee of the United States Government no matter how wrongful his act can exercise control over the property of private citizens and under color of his employment by the United States Government usurp property clearly belonging to other individuals without redress either in law or in equity.

ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The Circuit Court's decision affirming the judgment of the District Court dismissing this action is expressly restricted to the question of sovereign immunity and is clearly based on the Circuit Court's conclusion that this action is in effect one against the United States of America and hence, that under the doctrine of sovereign immunity the suit cannot be maintained.

This conclusion by the Court, it is respectfully submitted, is based on an erroneous interpretation by that Court of the meaning of the decisions of the United States Supreme Court

in the cases of *Larson v. Domestic and Foreign Commerce Corporation,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628; *Malone v. Bowdoin,* 369 U.S. 643 82 S.Ct. 980, 8 L.Ed. 2d 168; *Dugan v. Rank,* 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15; and *Hawaii v. Gordon,* 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed. 2d 191.

The Circuit Court below at page 60 of its opinion after referring to the general principle that the sovereign's wrongs may be rectified by ejecting its servants, as set out in the leading case of *U.S. v. Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171, and as followed in the subsequent cases of *Land v. Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209; *Colorado v. Toll,* 268 U.S. 228, 45 S.Ct. 505. 69 L.Ed. 927, and *Goltha v. Weeks,* 271 U.S. 536, 46 S.Ct. 613, 70 L.Ed. 1074, concludes that with the decision in *Larson v. Domestic and Foreign Commerce Corporation* "the tide set definitely in the other direction . . ."

Your petitioners respectfully submit that the Larson case decided by the Supreme Court in 1949 merely followed the long established principle that mandamus will not lie to direct a government official in the exercise of a function or decision which is placed in his discretion pursuant to statutory authority. See *Santa Fe Pac. R. Co. v. Fall,* 259 U.S. 197, 42 S.Ct. 466, 66 L.Ed. 896.

The Larson case, supra, was a suit to enjoin Robert M. Littlejohn, the head of the War Assets Adminstration, from selling certain surplus coal to anyone other than the plaintiff on the ground that he had already entered into a valid contract to sell this same coal to the plaintiff. The Supreme Court, three Justices dissenting, held that the action should be dismissed on the grounds that Littlejohn was clearly authorized by the statute under which he was acting to make the decision to enter into the contract in question and also

to decide whether he would carry out its terms or not and hence authorized to act by express congressional action in the respects complained of, that he was acting within the scope of his authority and that Governmental Immunity applied. However, the Court in its opinion at page 1636 again confirmed the basic rules in cases of this sort that where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. If the officer is not doing the business which the sovereign empowered him to do or if he is doing it in a way which the sovereign has forbidden, his actions are ultra vires his authority and may therefore be made the object of specific relief.

That the Circuit Court of Appeals, in the present case, has given the rule of the Larson case an interpretation going far beyond the bounds of that case is indicated by the Court's opinion at Page 60 where it makes the following broad and sweeping statement in connection with the Larson case: "The Court, thus, specifically rejected the notion that when a Governmental Agent's conduct is tortious, as where he wrongfully interferes with the plaintiff's possessory rights to property, he might not shield himself behind the Doctrine of Sovereign Immunity. The Court's explanation of Lee demonstrates Lee's inapplicability to this case in view of the existence of a provision for payment of compensation."

The Circuit Court below in the present case correctly interpreted the decision of the Supreme Court in the case of *Malone v. Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed. 2d 168 as an action of ejectment against a Forest Service officer to try title to land, in which it was conceded by the plaintiffs that the defendant acted within his delegated authority, since the Forest Service claimed the land under a deed and that on that account despite the fact that the plaintiffs might

have been able to prove theirs the superior title and an exclusive right of possession, it was held that the action could not be maintained.

It is respectfully submitted that the Circuit Court erroneously concluded at Page 60 of its opinion that "The only difference between Lee and Malone is the existence now of means for the recovery of damages for the wrongful taking. That difference was held in Malone to be critical, and the availability of damages is now held to foreclose equitable remedies."

In the Malone case the plaintiffs brought suit in ejectment in a Georgia State Court later removed to the Federal Court against a United States forest officer claiming that they were rightful owners of land occupied by the officer. The United States Supreme Court in dismissing the plaintiffs' suit on the grounds that it was one against the United States expressly recognized the continued validity of the rules previously laid down by the Court that the action of a Federal Officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual if the officer's action is not within the officer's statutory powers, or, if within those powers, if the powers, or their exercise in the particular case, are constitutionally void.

The following, it is respectfully submitted, are the pertinent distinguishing features between the Malone case and the present case. (1) In the Malone case the defendant was designated as "a forest service official of the United States Department of Agriculture." In the present case the defendants are designated only as individuals acting outside the scope of their authority.

(2) In the Malone case it appeared that the only actions by the defendant in occupying the land in question were in

pursuance of and in the scope of the authority of his "official duties as a forest service officer." In the present case it is abundantly clear that the actions of the defendants complained of were outside the scope of their authority and not related to their duties as employees of the Department of Interior or of the Park Service.

(3) In the Malone case it was expressly stipulated by the plaintiffs "that the petitioners in occuping the land was acting solely as an officer or employee of the Unitel States." In the present case this is expressly denied.

(4) Furthermore in the Malone case the forestry lands in question had been expressly deeded to the United States and the plaintiffs' claim arose as a superior claim of title by prior mesne conveyances to the plaintiffs. In the present case the plaintiffs' claim and property right as abutting owners in the roads in question arises not adversely to the title of the United States by reason of any separate claim of title superior to that of the United States, but in fact their claim is based on the very terms of the deed conveying the right-of-way of the Blue Ridge Parkway to the United States, and the question is not one of the validity of this deed for that indeed is admitted by all parties, but is solely one of interpreting the meaning of this deed and the plaintiffs in fact are claiming by virtue of this deed rather than against this deed.

It is of further interest to note that even in the Malone case Justice Douglas, with Justice Harlan agreeing, dissented on the grounds that even though in the Malone case the question of superior title to the lands was involved this was still a question for the Court to decide in determining the ultimate question of whether or not the defendant acted within the scope of his authority.

The Circuit Court below correctly concluded that *Dugan v. Rank, supra,* and *Hawaii v. Gordon* are distinguishable from the present case on their facts, but refers to them "to illustrate the renewed and abounding vigor of the doctrine of sovereign immunity as now applied by the Supreme Court."

The Circuit Court then, at Page 61 of its Opinion, states: "Construing the plaintiffs' rights of access to a federally owned parkway over federally owned land to be permissive only, they (the defendants) clearly acted within the scope of their authority in declining to acquiesce in the plaintiffs' assertions of greater rights . . . The United States owns in fee the land where the obstructions to the road are maintained. The Statute, 16 USCA, Sec. 460a-2 authorizes these defendants to administer those lands. All of this the plaintiffs concede. If the defendants have committed a wrong in the exercise of their delegated authority, if their administration of the land has deprived others of the enjoyment of their legal rights, a departure from the delegated authority is now shown. This is the plain holding of Larson."

The above reasoning of the Court, which is at the heart of its decision, is erroneous in its interpretation of the plaintiffs' position which is that the defendants are authorized by the provision of 16 USCA Sec. 460a-2 only to administer those lands conveyed to the United States for Parkway purposes and not by interpretation to acquire for the United States more lands or property rights than were actually conveyed to it, the plaintiffs' position being in fact that the United States did not acquire the fee simple title to the lands embraced within the area of the road in question, that is, the Kilmichael Tower-Queen Hollow Road, but only obtained the proprietary estate in said lands, the State of North Carolina expressly excepting from the operation of said deed any surrender of its state sovereignty over the

area embraced within the deed description and expressly reserving the right to maintain existing public roads within or across said area including the Kilmichael Tower-Queen Hollow Road. See Plaintiffs' complaint, Paragraph 8 (App. p. 7) and deed from the State of North Carolina to the United States of America (App. pp. 62-63) and that this was the clear interpretation placed upon the exception in the deed above referred to by the State of North Carolina. See Excerpt from brief filed by the North Carolina State Highway Commission to the North Carolina Supreme Court in original Condemnation Proceeding (App. pp. 60-61).

Hawaii v. Gordon, supra, the State of Hawaii brought suit in the United States Supreme Court against the Director of the Bureau of the Budget seeking an order requiring him to withdraw an administrative decision he had made with reference to certain lands admittedly owned by the United States and to make another determination with respect to those lands. The suit was dismissed by the Court under the Doctrine of Governmental Immunity. The administrative decision complained of in that case was a discretionary act clearly within the scope of the Budget Director's duties and powers relating to and affecting the title to approximately 203 acres of land owned by the United States Government and announces no new rule.

In *Dugan v. Rank, supra,* riparian owners brought suit seeking to enjoin local officers of the United State Bureau of Reclamation from diverting the waters of the San Joaquin River in California where it passed by the petitioners' land. The Circuit Court had refused to dismiss the action as against the individual defendants and the Supreme Court, in reversing that decision, held that the suit against the Reclamation officials was in fact a suit against the United States without consent, in view of the fact that the decree granted would have interfered with the public administration, required ex-

penditure of public funds and would have required the United States, contrary to mandate of the Congress, to dispose of irrigation water and to deprive the United States of full use and control of Reclamation facilities.

The distinguishing features of *Dugan v. Rank* case are as follows:

(1) In the Dugan case, the remedy requested, directly and substantially affected a vast Federal irrigation project involving 325,000 acres of land including part of the City of Fresno, California, all of which had been constructed over a period of many years.

(2) In the Dugan case the Court expressly found that the above irrigation project, including the diversion of waters complained of, had been constructed by the Secretary of Interior pursuant to express statutory authority and hence the actions of the Government officials were pursuant to that statutory authority.

(3) The Court in the Dugan case further found that the result of the injunction in that case would be to force the abandonment of a substantial portion of that vast governmental reclamation project and require the United States Government to construct ten additional dams in order to comply with the terms of the order of the lower court.

In the present case no such vast project is involved and the only action required is for the individuals to remove the obstructions which they have caused to be placed at the entrances of the Kilmichael Tower-Queen Hollow Road onto the Parkway; the erection of which, they do not claim to have been made pursuant to any express congressional authority, claiming only that since they are Government employees and purport to have been carrying out their duties as Government employees in erecting the barricades that

they are immune to suit and that their actions are beyond question in any Court, yet they cite no statutory or other authority for their actions.

The United States Supreme Court (in the Dugan Case at page 1007 of its opinion) again recognized and reaffirmed the traditional exceptions to the rule of sovereign immunity as set out in all the cases hereinabove referred to when it said:

> "Nor do we believe that the action of the Reclamation Bureau officials falls within either of the recognized exceptions to the above general rules as reaffirmed only last Term." *Malone v. Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed. 2d 168. See *Larson v. Domestic & Foreign Corp., supra; Santa Fe Pac. R. Co. v. Fall*, 259 U.S. 197, 199, 42 S.Ct. 466, 467, 66 L.Ed. 896 (1922); *Scranton v. Wheeler*, 179 U.S. 141, 152-153, 21 S.Ct. 48, 52-53, 45 L.Ed. 126 (1900). Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Malone v. Bowdoin, supra*, 369 U.S. at 647, 82 S.Ct. at 983, 8 L.Ed. 2d 168."

The Circuit Court at Page 62 of its opinion in the present case recites that the "plaintiffs seek a judgment declarative of their rights as against the United States. This is apparent in their joinder as defendants of individuals, occupying high Governmental Offices, who could have had no personal involvement in the little incidents giving rise to this controversy . . ." It is respectfully submitted that the Circuit Court apparently has overlooked the uncontradicted testimony of the plaintiffs' witnesses to the effect that the defendant, Mr. Sam P. Weems, admitted "that he had had those accesses closed because he had heard that there was going to be a

subdivision built up on one of them," and further that at a subsequent conference in Washington, D. C., "Mr. Wirth (the defendant, Conrad Wirth) acknowledged that the roads had been closed and took the position that they had a legal right to do it." (App. pp. 81-83).

The Case of *Colorado v. Toll,* 268 U.S. 228, 45 S.Ct. 505, 69 L.Ed. 927 is most nearly in point with the present case and the Circuit Court's opinion in the present case it is respectfully submitted is in direct conflict with the ruling of the United States Supreme Court and the ruling of the Circuit Court below in that case. The Colorado case was an action by the State of Colorado against Roger W. Toll, Superintendent of the Rocky Mountain National Park, to enjoin the enforcement of regulations by the Superintendent of a National Park which attempted to exercise control and supervision over the state roads within the area of the Rocky Mountain National Park. In holding that the District Court had jurisdiction and that governmental immunity did not apply, the Court said at pages 929 and 930 of the opinion:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining with his superior officers or the United States . . ."

> "There is no attempt (by the act creating this National Park) to give exclusive jurisdiction to the United States, but on the contrary, the rights of the state over the roads are left unaffected in terms . . . As the defendant is undertaking to assert exclusive control, and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the state has not surrendered its legislative power, a cause of action is disclosed . . ."

Since the above case of *Colorado v. Toll* was cited and argued in the plaintiff's brief on appeal before the Circuit Court below and the Circuit Court has not discussed that case in its opinion below apparently the Circuit Court considers that the later cases hereinabove discussed have in effect overruled Colorado v. Toll, and it considers that case no longer authority.

While the decision of the United States Supreme Court in *Malone v. Bowdoin* apparently does place some limitations on the very broad rule of exceptions to Governmental Immunity as laid down in the case of *U.S. v. Lee* 106 U.S. 196, 27 L.Ed. 171, it is respectfully submitted that the Malone case clearly does not reverse or limit the rule of *Colorado v. Toll* or *Land v. Dollar, supra,* and the present case clearly comes within the exceptions to Governmental Immunity as set out by this Court in those cases.

The Circuit Court of Appeals in the present case indicates that it interprets the case of *Dugan v. Rank* to mean that equitable relief against Governmental Officers cannot be allowed when the requested relief would affect the administration of a Governmental Project in any way since the plaintiff now has the alternative relief in a suit to recover just compensation; however in this connection it is essential to note the following:

If it is determined in some later proceeding to recover "just compensation" that the State of North Carolina in its deed of the Parkway lands to the United States of America did not effectively reserve title to the Kilmichael Tower-Queen Hollow Road right-of-way, then the defendants have committed no wrong in closing this road and, of course, no recovery could be had. On the other hand, if it should be found that a tort has been committed in this case, this would mean that the State of North Carolina effectively reserved

the right-of-way to the Kilmichael Tower-Queen Hollow Road and the defendants who are authorized under 16 USCA 460a-2 *only,* to administer government lands, were acting outside the scope of their authority in closing this road which did not belong to the United States and which the United States did not claim, hence the United States could not be held liable for damages and would benefit from the defendants wrong and the plaintiffs' property would remain effectively taken. Note that 16 USCA 460a-2 does not give these defendants the authority or discretion to decide what lands do or do not belong to the United States as was in case of *Hawaii v. Gordon, supra,* it only grants to them authority to administer such lands as do belong to the United States.

An action to recover damages by abutting landowners resulting from the obstruction of an easement is an action in the nature of tort on the case and hence could not be brought in the Court of Claims under Tit. 28 USCA, Sec. 1491, which excludes actions sounding in tort.

The theory of the Circuit Court below in the present case being that the claim of the defendants by .way of defense that title to the road in question belongs to the United States is in effect the claim of the United States to that title bars suit for damages for a wrongful taking under the Tucker Act, since no implied contract could arise in this situation. *Temple v. U.S.,* 39 S.Ct. 56 248 U.S. 121, 63 L.Ed. 162.

Nor can there be a recovery under the Tucker Act for an intentional taking unauthorized by statute 28 USC, Sec. 1346. *Kellettville Gas Co. v. U.S.* (D.C. Pa. 1944) 56 Fed. Supp. 919. Nor can there be any recovery under the Tucker Act on the theory of implied contract in the absence of the actual appropriation of plaintiffs' land by the United States Government. *Goodman v. U.S.,* CCA 1940, 113 Fed. 2d 914. In the present case the property rights of the plaintiff have

been taken by the closing of a public road without an actual appropriation of the plaintiffs' land and again under the Goodman case no remedy lies under the Tucker Act or in the Court of Claims under Tit. 28 USC, Sec. 1491.

For the foregoing reasons there is no remedy at law for damages available to the plaintiffs; and if the opinion of the Fourth Circuit Court of Appeals is allowed to stand, Federal employees working in whatever capacity on any Federal Project will carry with them the inherent power to destroy proprietary rights of landowners who will be left without remedy either in law or in equity and their property taken in direct violation of the provisions of the Fifth Amendment to the United States Constitution.

Up to this point the plaintiffs have had no final determination in a Court of law as to whether the deed under which the United States of America received title to the lands comprising the Blue Ridge Parkway right-of-way and under the express terms of which deed the rights of the plaintiffs, if any, also arise effectively excepted from the operation of said deed the right-of-way to the Kilmichael Tower-Queen Hollow Road and the only persons who have made such determination up to this point being the individual defendants in this case. It is respectfully submitted that neither the Constitution of the United States of America nor the provisions of Tit. 16 USCA, Sec. 460a-2 intended or did grant to these individuals such power and authority and the decision of the Fourth Circuit Court of Appeals below can only be sustained on such a theory and this decision goes far beyond and is contrary to the decisions of the United States Supreme Court in matters of this sort and creates a conflict in the decisions among the various Circuit Courts of Appeal in a matter of wide public interest and creates confusion in the status of the property rights of a wide segment of our

society and creates wide confusion as to the extent of the powers and duties of Parkway employees over the entire Federal Parks System and is a matter of wide public interest which should be settled by the United States Supreme Court.

It is respectfully submitted for the foregoing reasons that this Petition for Writ of Certiorari should be granted.

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